Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ERIC STATTIN

Petitioner

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION
As Statutory Successor To
RESOLUTION TRUST CORPORATION
And As Receiver For
FLORIDA FEDERAL SAVINGS, F.S.B.
And
FLORIDA FEDERAL SAVINGS BANK

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a receiver's certificate representing a vested retirement obligation of a failed federally chartered S&L a property interest that merits protection under the Fifth Amendment of the United States Constitution?

2. Can the State of Florida by statute retroactively reduce the priority status of such a vested right thereby causing the value of that right to be paid to the Resolution Trust Corporation, an agency of the Federal government, thus effecting a "taking" prohibited by the Fifth Amendment?

3. Did RTC violate Petitioner retiree's constitutional right to due process by failing to follow its own regulation governing priority treatment of unsecured creditors in a failed S&L receivership?

PARTIES TO THE PROCEEDING

Petitioner, Eric Stattin, is a resident of Park City, Utah. He was the plaintiff in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondent, the Federal Deposit Insurance Corporation, (FDIC) is the statutory successor to the Resolution Trust Corporation (RTC). The RTC was the receiver for Florida Federal Savings, F.S.B. and Florida Federal Savings Bank, both federally chartered savings and loan associations.

There were three other parties to this action in the lower courts. They are Bruce Beery, Charles Bissett and Eugene L. Williams, Jr.

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Exhibit I--United States Court of Appeals for the 11th Circuit decision dated December 28, 1995

Exhibit II--United States District Court (Middle District of Florida) decision dated March 25, 1994

Exhibit III--United States District Court (Middle District of Florida) decision dated April 28, 1995

Exhibit IV--United States Court of Appeals for the 11th Circuit denial of petition for rehearing dated February 29, 1996.

Exhibit V--Receiver's certificate number 27 issued by the Resolution Trust Corporation

Exhibit VI--Balance Sheet for Liquidation Accounting for Florida Federal Savings Bank

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OPINIONS BELOW

On December 28, 1995, the Eleventh Circuit affirmed the District Court's decision. (Exhibit I) No written opinion was issued. The District Court's decisions came in two parts. The first was March 25, 1994, (Exhibit II) and the second April 28, 1995 (Exhibit III). Stattin petitioned the Eleventh Circuit for a rehearing which was denied February 29, 1996 (Exhibit IV).

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Eleventh Circuit of December 28, 1995. That judgment affirmed the lower court's decisions. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> ....nor be deprived of life, liberty, or property, without due process of law; nor shall private property be compensation.

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts are simple and not in dispute. Petitioner, Eric Stattin, was retired from Florida Federal Savings (located in St. Petersburg, Florida). Commencing in September, 1988, he began to receive a pension of approximately $3,237 per month. This was to continue for 15 years.

This pension was paid until November, 1990, when Florida Federal went into receivership under the Resolution Trust Corporation. RTC disavowed the retirement contract pursuant to 12 U.S.C. §1821(e)(1). RTC sent a claim form to Stattin with instruction to file a claim for the damages occasioned by the contract disavowal. Stattin filed a claim which was approved for the full amount. The claim is evidenced by receiver's certificate number 27 in the amount of $495,285.48 (Exhibit V).

On July 3, 1992, the Florida Legislature enacted a "depositor preference" law (section 658.84). This state law put depositors and the subrogee of the depositors, RTC, ahead of general creditors like Stattin. This was done by couching the change in priorities in terms of "distributions" from receiverships occurring after July 3, 1992.

The new law reads as follows:

658.84. Transfers by banks and other acts in contemplation of insolvency

(1) [not relevant]
(2) Unsecured claims for payment against any financial institution
shall have the following priority for any **distribution** made after July 3, 1992:
(a) Expenses of the liquidation of the receivership estate;
(b) State claims; .
(c) Approved claims for a "deposit" as that term is defined in 12 U.S.C. § 1813(1);
(d) Approved claims for other general creditors;
(e) and (f) [not relevant]
(Emphasis added.)

In other words, if a general creditor had not received a distribution with respect to its claim prior to July 4, 1992, the creditor's priority standing was reduced from equal with RTC to inferior regardless of when the receivership commenced.

Stattin brought suit in the District Court in Tampa, Florida. This lawsuit claimed that the new Florida depositor preference law had an unconstitutional retroactive effect. The District Court held that the receiver's certificate does not:

"...[constitute] a property right which merits protection under the Fifth Amendment. Accordingly, the Court will dismiss Count IV of Plaintiff's Complaint, and need not reach the issue of whether the

application of 658.84 constitutes an uncompensated taking in violation of the Fifth Amendment." (Page 8 of order dated March 25, 1994.)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO AVOID A MANIFESTLY UNJUST RESULT. TO NOT DO SO WOULD BE TO SANCTION A "TAKING" BY THE RESOLUTION TRUST CORPORATION OF A PROPERTY RIGHT POSSESSED BY STATTIN. THIS TAKING WOULD BE DONE THROUGH OPERATION OF A CLEARLY RETROACTIVE LAW.

Is a Receiver's Certificate Property?

The lower court specifically ruled that a receiver's certificate is not "property" for purposes of the Fifth Amendment. (See page 8 of District Court order dated March 25, 1994, Exhibit II.)

The certificate in question is attached as Exhibit V. The language of the certificate clearly indicates that it is "property". It states:

> "...said creditor or the lawful assignee of this claim will alone be entitled to any distributions made hereon. No assignment of this claim, or any portion thereof, will be recognized as to any distribution unless written notice of assignment has been given to the Receiver and accepted by it and entered hereon before such distribution has been paid. This certificate must be surrendered to the Receiver upon payment of the final distribution. Claimant should notify the Receiver

promptly of any change in claimant's address." (Emphasis added.)

The receiver's certificate even provides on its face for "assignability" for value. RTC would have the courts believe that the thousands of receivers' certificates issued in the hundreds of failed thrifts throughout the country during the past decade or longer were not property which merited Fifth Amendment protection. Such a position is patently ridiculous.

On the general question of what is property that is entitled to protection from a "taking", the Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974) cites Board of Regents v. Roth, 408 U.S. 564 (1972):

> "We said: Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits (408 U.S. at 577)"

In the case of an unsecured claim against a receivership, the property interest is predicated on:

1. The legitimacy of the claim. RTC admits to legitimacy. One of the most basic functions of RTC in managing a receivership is to determine who should be paid. The process followed in Petitioner's case was for RTC to request the relevant

documents. This was done and upon examination, RTC concluded that the claim was valid.

2. The amount of the claim. A sum certain was claimed by Petitioner and "certified" by RTC. Petitioner's claim, like all others against the Florida Federal receivership, had to be quantified. Absent the ability to quantify the claim, its standing versus others could not be determined.

3. Relative priority of the claim. Aside from the amount, the most critical feature of any claim against a receivership or bankruptcy is its priority. On the day the receivership commenced, RTC was obligated by law to respect a prescribed priority schedule. Under this schedule, Petitioner's claim was equal in priority to RTC.

4. Finally, a pool of assets from which the claim will be satisfied must exist. If higher priority claims exhaust the assets available to unsecured creditors such as Petitioner and RTC, then Petitioner's and RTC's claims would be worthless and probably then would not merit Fifth Amendment protection.

This last characteristic is clearly met. If it weren't, RTC and Petitioner would not be engaged in this litigation.

At the inception of the Florida Federal receivership, the RTC reported total assets of $2,169,243,057 and total liabilities of $2,354,018,490. (See Exhibit VI, Balance Sheet for Liquidation Accounting.) Had there been no further losses and no expense of administration,

the unsecured creditors would have received approximately 92.15% of their claims (assuming there were no secured creditors). Petitioner estimates that after more than five years of liquidation unsecured creditors would now receive approximately 80% of their claims.

These characteristics are all "defined by existing rules or understandings", really more than a century of rules that deal with treatment of creditors in business failure situations. There is nothing uncertain about the property interest represented by the receiver's certificate except the ultimate value. If RTC does a good job as receiver or is lucky, the pool of assets available to satisfy Petitioner's certificate (and RTC's) will be more. If RTC manages the receivership poorly or has bad luck, the realization will be less.

In the circumstances of virtually all failed S&L receiverships (in states with no pre-existing depositor preference law) unsecured creditors with approved claims (represented by receiver's certificates) were paid a significant portion of their claims. To assert that the property interests of these creditors did not merit constitutional protection because they were uncertain as to amount seems absurd.

The District Court described Petitioner's claim as an "**unsecured expectation of an unspecified distribution**" (emphasis added) as not being a:

> "property right which merits protection under the Fifth Amendment. Accordingly, the Court will dismiss Count IV of Plaintiff's

Complaint,...". (Count IV is the Fifth Amendment claim.)

But when does lack of security and/or uncertainty of value cause a property interest to be ineligible for Fifth Amendment protection? It should be absolutely clear that no unsecured claim against any receivership or bankruptcy could ever pass the District Court's test.

On the day Florida Federal went into receivership Petitioner had an undisputed vested interest in a retirement plan. The law in effect on that day unequivocally placed Petitioner and RTC on equal footing in terms of a right to share in the proceeds of the liquidation of Florida Federal.

Twenty months later, Florida enacted 658.84 which promoted RTC's and demoted Petitioner's priority standing. Can this be done without being a "taking"?

Common sense and virtually all Supreme Court precedent would seem to compel a "no" to this question.

In reaching the conclusion that a receiver's certificate is not property which "merits protection under the Fifth Amendment", the District Court cited in its March 25, 1994, order (at page 8) Goodman vs. Resolution Trust Corp., 7 F.3d 1123 (4th Cir. 1993) and Spears vs. Federal Deposit Insurance Corp., 793 F.2d 270 (10th Cir. 1986). The District Court made a true but irrelevant statement:

"Plaintiff's certificate represents a right to payment from the pool of assets of the failed institution, but

> does not grant Plaintiff a secured interest in those assets." (Citing Goodman v. Resolution Trust Corp., 7 F.3d 1123 (4th Cir. 1993).)

The question of a receiver's certificate representing a secured interest in a failed thrift's assets is irrelevant to the question of whether or not that property interest deserves the protection of the Fifth Amendment. If the claim had been secured, this matter would not be before the courts.

The Goodman case, furthermore, is fundamentally irrelevant. It was about officers of a failed thrift who had set up "Rabbi" trusts to try to protect their severance payments from creditor attachment. By their very terms, the trusts subjected themselves to creditor claims in the event of insolvency, etc. Goodman tried to bootstrap his claim by challenging the language of the trusts versus what transpired. Goodman tried but failed to have his cake and eat it, too. Goodman wanted no tax effect on creation of the trust by making it subject to creditor attachment but simultaneously protecting it from the consequences of the thrift failing.

The Court of Appeals, at page 1129, could not have made more clear the rule that Petitioner seeks to have applied.

> "Appellants further contend that the Receiver does not represent the general creditors of Yorkridge. This is preposterous. The RTC is seeking the trust assets at issue in its capacity as Receiver of Yorkridge. In that capacity, the RTC represents not

only the institution but also the institution's depositors and other creditors. It is the responsibility of the Receiver under federal law to marshall the assets of the institution and to use those assets to pay the claim of all creditors in the established order of priority. See 12 U.S.C. § 1821(d). The RTC as Receiver, owed a statutory duty to all creditors to collect the institution's assets and to pay the claims of creditors out of those assets." (Emphasis added.)

What RTC would prefer in petitioner's case would be to use the term "established or to be established" in defining its duty. That cannot be squared with the rarely if ever violated rule that vested rights will not be taken without due process and that rights and liabilities in receiverships and bankruptcies are determined at the time of filing.

See United States ex rel. White v. Knox, Comptroller, 111 U.S. 784, May 5, 1994, 4 S.Ct. 686, 28 L.Ed. 603, 604 where the Supreme Court said:

"It was clearly right, therefore, to ascertain from the judgment how much was due on this claim at the date of the insolvency, and make the distribution accordingly."

More recently, the 10th Circuit in F.D.I.C. v. Liberty Nat. Bank & Trust Co., 806 F.2d 961, 965 (1986) said:

"To ensure a 'ratable' distribution of assets, as required by

12 U.S.C. § 194, the Supreme Court has held that the amount of each claim is to be determined as of the date of insolvency." (citing Knox, supra)

The 10th Circuit goes on to state in Liberty Nat. Bank:

"It is as much the purpose of the insolvency statutes to preserve rights existing at the time of insolvency as to prevent new rights from arising thereafter. See Merrill, 173 U.S. at 147, 19 S.Ct. at 367 ('The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any of such creditors, and ought not to be construed as having, or being intended to have such a result.');"

Given an unbroken string of holdings that priorities in bank receiverships are fixed on the date of insolvency, the 11th Circuit is clearly in conflict with other Circuits and the Supreme Court itself.

The District Court also cites Spears v. Federal Deposit Insurance Corp., 793 F.2d 270 (10th Cir. 1986) in apparently the same vein as Goodman, apparently to the effect that Petitioner doesn't have a secured interest in the assets of the receivership. This case is far afield of the question of whether or not a receiver's certificate is property eligible for Fifth Amendment protection and the issue of whether Petitioner's certificate is secured is not before any court. (The Federal Reporter, 2d Series, seems to designate this case "In re First

Penn Corporation, Debtor with Kenneth L. Spears in second place in the citation sequence.)

On page 272 of Spears the Court said:

> "We hold that recovery of the payments First Penn made is necessary to prevent unjust enrichment, as the FDIC effectively has admitted."

Unjust enrichment is an issue in Petitioner's case against RTC Corporate in the event RTC Receiver winds up completely the affairs of the Florida Federal receivership before this dispute is settled and nothing remains to pay Petitioner's claim.

Although the District Court didn't cite it, RTC relied on In re Will of Martell, 457 So. 2d 1064 (Fla. 2d DCA 1984). It is in this case that the term "mere expectation" appears. An interest that is a "mere expectation" or in the District Court's view, an unsecured expectation is not eligible for Fifth Amendment protection.

In order to appreciate the irrelevance of this case, the facts become critical. In Martell, the aggrieved party was an adopted child who was by statute cut off from inheriting part of his natural grandfather's estate. The legislative objective was to prevent a person from being an inheritor from two family lines. At the time the law was changed, the aggrieved person could not have inherited unless he survived his natural grandfather and mother. This was a contingency piled on top of a contingency. The court in Martell very properly noted that there was

no "substantive vested right" of present enjoyment or a "present fixed right of future enjoyment".

Contrast the Martell situation with Petitioner's. There were no intervening, unpredictable preconditions that must occur to prevent Petitioner from enjoyment of his pension. He didn't have to survive his grandfather, nor did his mother have to survive his grandfather, nor did Petitioner have to survive anyone. He had an absolute vested right to his pension. It was not a "mere expectation". Petitioner was already collecting the pension. It couldn't be more vested unless it had been paid in full.

In Coombes vs. Getz, 52 S.Ct. 435, (April 11, 1932) the Supreme Court held that a retroactive law:

> "...could not destroy or impair the previously vested right of the creditor (which in every sense was a property right," (citing Ettor v. Tacoma, 223 U.S. 148, 156, 33 S.Ct. 428, 57 L.Ed. 773). (Emphasis added.)

Coombes was about a right to sue directors for loss from defalcation. California amended its constitution taking away this right. The Supreme Court held that this could not be done retroactively.

If the right to sue is a constitutionally protected property right, how can a receiver's certificate not be?

The District Court also cited United States v. Willow Power Co., 324 U.S. 499, 502 (1945) to the effect that "Not all

economic interests qualify as property for the purpose of a Fifth Amendment taking."

The Willow Power case was about a company losing a certain level of "head" in a river which was advantageous for hydroelectric power production. At page 510 the Court stated:

> "Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the government such private interest is not a right at all."

The facts in Willow Power would not seem to be even remotely related to the facts in Petitioner's case.

CAN FLORIDA PASS A LAW WHICH RETROACTIVELY CHANGES PRIORITIES IN A FEDERAL RECEIVERSHIP?

On the day Florida Federal entered receivership, the law governing priorities (12 C.F.R. § 360.2(a)(6)) for a federal S&L receivership put Petitioner and RTC on equal footing. If the liquidation of Florida Federal produced a dividend for unsecured creditors (Petitioner and RTC

were both unsecured creditors) of 50 cents on the dollar, RTC would enjoy a 50% recovery as subrogee of the depositors and Petitioner would recover 50% of his claim. (Petitioner estimates the ultimate recovery by RTC to be closer to 80%.)

The priority schedule in effect when Florida Federal went into receivership provided as follows (12 C.F.R. § 360.2(a)(6)):

> "(a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:
> [(1) through (5) are not relevant.]
> (6) Claims for withdrawable accounts, including those of the Corporation [Federal Savings and Loan Insurance Corporation] as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section, provided, however, that if the association is chartered and was operated under the laws of a state that **provided a priority** for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph (a)(6) shall be observed by the receiver; and provided further, that if deposits of a Federal association are booked or registered at an office of such association that is located in a

State that provides such priority with respect to State-chartered associations, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver. (Emphasis added.)

The priority scheme for a federally chartered S&L (Florida Federal was federally chartered) is affected by the existence of a depositor priority preference set by a state for state chartered S&L's. But note the past tense indicated in such case. The state must have "**provided a priority**".

A reference back in time is perfectly consistent with the earlier phrase, "which have accrued and become unconditionally fixed on or before the date of default". Any other reading of this regulation would be at great odds with common sense rule-making and interpretation. The later reference to how a federal S&L's depositor/creditor priorities are thus governed could be read no other way than to be parallel. The same rule applies to both types of charters. There is no language in this priority law that would accommodate a retroactive change brought about by a state legislature passing a law like 658.84.

The District Court, denying Petitioner's Fifth Amendment claim cited North Arkansas Medical Center v. Barrett, 962 F.2d 780 (8th Cir. 1992) to the effect that:

"...retroactive application of FIRREA's amendment to 12 U.S.C.

§1823(e) to deny a secured creditor's priority did not constitute an uncompensated taking)." (See page 7 of March 25, 1994 order.)

On page 790 of the North Arkansas decision the 8th Circuit discusses the application of the Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986). In concluding that there was no Fifth Amendment violation, the court stated:

> "The FDIC is acting in its receivership, not its corporate capacity, and therefore the effect of denying the priority will generally inure to the benefit of Guaranty's depositors and creditors rather than to the government." (Emphasis added.)

This cannot be said about the "taking" in Petitioner's case. His priority is retroactively reduced and the entire value of his claim goes directly to the government.

RTC's failure to follow its own regulation for the treatment of unsecured creditors of a failed thrift is a violation of the Fourteenth Amendment. See International House vs. NLRB, 676 F.2d 906, 912 (2d Cir. 1982). The NLRB failure to follow its own regulations constituted a violation of the Fifth Amendment guarantees of due process and equal protection. Given that the moving force in Petitioner's case was the Florida Legislature, the Fourteenth Amendment's prohibition against state actions would seem to be implicated also.

About one year after the Florida Legislature passed 658.84, the United States Congress amended Section 11(d)(11) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(11) to give preference to depositors over general creditors in S&L (and bank) receiverships. The effective date provision of the change states:

> "The amendments made by this section shall apply with respect to insured depository institutions for which a receiver is appointed after the date of enactment of this Act." (Emphasis added.)

If a constitutionally permissible retroactive change could have been accomplished, why didn't Congress do just that? The stakes nationally for RTC were enormous. Petitioner was unable to find any mention of debate about seeking retroactivity but the stated goal of this change was explicitly to save the government money in future liquidations by elevating depositors and RTC over unsecured creditors. Petitioner believes that Congress knew beyond any doubt that an attempt at retroactive change would have met with an immense, nationwide Fifth Amendment challenge.

Contrast the federal legislation with what Florida did. The relevant language of the Florida law is:

> (2) Unsecured claims for payment against any financial institution shall have the following priority for any **distribution** made after July 3, 1992:
>
> (c) Approved claims for a "deposit," as that term is defined in 12 U.S.C. § 1813(l);

(d) Approved claims for other general creditors;
(Emphasis added.)

If RTC had wound up the liquidation of Florida Federal on July 3, 1992 or earlier and paid a final dividend, Petitioner would have been paid. He wasn't paid so on July 4, 1992, because no distribution had by then been made to Petitioner, his receiver's certificate became worthless. RTC's claim against the receivership was enriched by exactly the amount Petitioner lost.

The Florida law, as interpreted by the RTC and upheld by the lower courts, did this in a rather cute way. Instead of rolling back time and assigning the new priority scheme to each receivership as of the day it commenced, the priorities on July 4, 1992 and later were to be based on distributions from receiverships.

The District Court then held that this effect was intended by the Florida Legislature, citing cases on statutory construction (Landgraf vs. USI Film Products, 114 S.Ct. 1483 (1994) being the most prominent and arguably irrelevant.) to the effect that retroactive legislation is permissible so long as retroactivity is intended. However Landgraf doesn't represent a license to destroy vested property rights.

Landgraf was a statutory construction case. Much of the decision deals with whether or not certain provisions of the Congressional act in question implicitly or by canons of statutory construction should cause a certain section of the act to apply retroactively. The Court held

that it was not to be construed to have retroactive effect.

> ("...we observe that she (petitioner) places extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute.") (page 1493)

> "As JUSTICE SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' Kaiser, 494 U.S., at 855, 110 S.Ct., at 1586 (SCALIA, J., concurring)." (page 1497)

The law, in Petitioner's case was the priority scheme that existed on the day Florida Federal went into receivership, not the law that came into being almost two years later.

On page 1497 of Landgraf, the court said:

> "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures

poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."

There could very well have been an element of "retribution" in 658.84. A staff person on the Florida legislative committee that was responsible for 658.84 referred to it as the "David Paul Law". (Mr. Paul, currently incarcerated, was the CEO of Centrust Savings, the largest and most costly failure in Florida.)

Whether or not the "David Paul" connection to 658.84 exists, the fact remains that this retroactive law destroyed the vested right of at least four Florida Federal pensioners, including Petitioner. There is absolutely nothing in the legislative history of 658.84 that demonstrates any thought having been given to the total destruction of Petitioner's vested rights.

Landgraf quotes Justice Story from the Society for Propagation of the Gospel vs. Wheeler, 22 F.Cas. 756 (No. 13,156 CCDNH 1814):

"every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective..." (page 1499)

"Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The

conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." (page 1499)

"The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." (page 1500)

Although Landgraf was primarily a statutory construction case, the reasoning above would seem logically to apply to a law which deals with events anterior to its passage thereby taking property away from a private citizen and giving it over to the government.

The District Court at page 7 of the March 25, 1994 decision cited Connolly v. Pension Benefit Guaranty Corporation., 475 U.S. 211, (1986). This case is not a license to destroy vested rights. Connolly involved a retroactive law and a question of its constitutionality. The critical difference between Connolly and Petitioner's claim of unconstitutional "taking" is that in Connolly the government was not the beneficiary of what was lost by the aggrieved party. In Connolly, the alleged injury was caused by the retroactive law imposing contingent termination liability on employers for underfunded multi-employer pension plans. On pages 224 and 225, the Connolly decision emphasizes that:

"...the United States has taken nothing for its own use,..."

and,

"...the Government does not physically invade or permanently appropriate any of the employer's assets for its own use."

On page 223 the Court said:

"Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."

In Petitioner's case, the "taking" is not to advance some "governmental power to regulate" or to shift costs and benefits between private parties but rather to take Petitioner's property and give it to the federal government.

Connolly was different in another critical respect. The law at issue had a number of mitigation provisions. These limited the total cost to be borne by any withdrawing plan sponsor to some reasonable level.(See footnote 8 on page 226.)

Not so 658.84. It "takes" 100 percent. No mitigation of effect whatsoever.

On page 227 the Court noted that the employers affected had "more than sufficient notice" that some additional financial obligations might accrue.

Contrast that with the notice given to the change in 658.84. There was none. Certainly there wasn't even a hint prior to the time that Florida Federal went into receivership that such a profound change in the law might occur.

Connolly sets forth three tests for determining whether an unconstitutional "taking" has occurred.

1. What is the "economic impact" on the Petitioner?

His entire pension is lost.

2. To what extent did the Statute "interfere with distinct investment-backed expectations"?

In this case Appellant had invested an important part of his working career in exchange for which he earned a rather modest pension. Of all the things in which a person invests during a lifetime that deserves to be treated with respect by the law, certainly a pension should be high on the list.

3. What is "the character of the governmental action"?

No matter how one views the process, at the end of the day, RTC (a federal agency) has all of Appellant's retirement funds (estimated to be worth about $400,000). In Connolly and Landgraf there was no benefit that flowed from a private party to the government.

RTC's case fails on all three tests.

There are two Supreme Court cases that dealt with a retroactive law where a "taking" was alleged. The earlier case was Home Building & Loan Ass'n v. Blaisdell, 54 S.Ct. 231 (1933). Minnesota passed a retroactive law giving relief to mortgage debtors in the form of time. The lender, Home Building & Loan, was precluded from exercising its foreclosure sale contract right. The case primarily involved a challenge under the Fourteenth Amendment prohibiting a state from passing laws that interfere with contracts and deny equal protection. The Supreme Court held that the law was not unconstitutional because it only delayed for a reasonable time the mortgagee from enjoying the protection of his vested contract rights.

Petitioner's delay in the enjoyment of his retirement benefit is eternal, not for just a "reasonable time".

The Supreme Court in 1935 decided Louisville Joint Stock Land Bank v. William W. Radford, Sr., 79 L.Ed. 1593. This was a Depression era case similar to Home v. Blaisdell. This case centered around the constitutionality of the Frazier-Lemke Act. This Act effectively nullified critical aspects of mortgages to the benefit of the borrower and detriment of the lender.

In holding the Act unconstitutional, the Court said:

> "The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are

of substantial value.....As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

This is chillingly similar to the facts at hand. There has been a generalized debacle involving the S&L industry. The cost of repairing the damage is considerable and, unfortunately but appropriately, is being borne mainly by the taxpayers. But here the RTC wants a pensioner to lose his entire (and only company pension) in order to mitigate to an infinitesimally small degree the cost to the taxpayers (through RTC). The cost of this mitigation to petitioner is total and permanent loss, not as in Home v. Blaisdell, a moderate delay in the enjoyment of the benefits of an asset.

ANOTHER REASON TO REVERSE IS THE EFFECT OF THIS PRECEDENT ON FUTURE STATE LEGISLATURES PASSING RETROACTIVE LAWS COUCHED IN TERMS OF "DISTRIBUTIONS"

There are now two cases that stand for the proposition that an approved claim in a receivership (and by drily logical

extension, a bankruptcy claim) is not a property right which merits Fifth Amendment protection. The two cases are In re Advisory Opinion to Governor (DEPCO), 593 A.2d 943 (R.I. 1991) and Stattin vs. Resolution Trust Corporation, U.S. District Court, Middle District, Florida, April 28, 1995 (affirmed by the 11th Circuit December 28, 1995). Both of these cases also hold that a law with the retroactive effect of changing priorities in a receivership is constitutional so long as no distributions have been made. The fact that Stattin was upheld by the 11th Circuit Court of Appeals would seem to give a high level of judicial credence to these new "principles".

The DEPCO case was cited by the District Court in its March 25, 1994, ruling (at page 8) to the effect that "...operation of depositor preference statute does not constitute a Fifth Amendment taking)."

The Rhode Island law was explicitly retroactive in reducing the priority standing of creditors to the advantage of depositors. This would seem to be extremely weak precedent for a Fifth Amendment defense. The Rhode Island situation involved essentially uninsured thrifts and the reordering of priorities between depositors and creditors and did not result in any governmental unit getting the benefit.

Given the holding in Stattin v. RTC, there would seem to be no constitutional bar to similar laws in any number of

analogous situations. For example, since "unsecured expectations of unspecified distributions" were held not to be property within the meaning of the Fifth Amendment, couldn't a state legislature retroactively ban such things as contingent legal fees which relate to existing lawsuits?

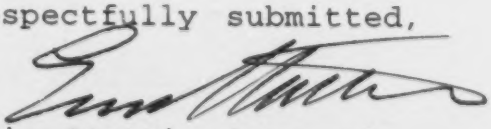
Is there any judicial barrier to laws which retroactively turn priorities topsy turvy in bankruptcies where claims have not yet been paid?

CONCLUSION

This case, standing by itself before the Supreme Court of the United States is pretty small potatoes. It is not so for Petitioner. It is material. The litigation through the 11th Circuit was expensive. Absent a firm belief that Petitioner's constitutional right to due process has been violated, this "pro se" effort would not be pushed on the Court.

If left to stand, the decision of the District Court and affirmed by the 11th Circuit sets a constitutionally indefensible precedent. This manifestly unjust decision should be reversed.

Respectfully submitted,



Eric Stattin (pro se)
P.O. Box 1842
Park City, Utah 84060-1842
801-649-9443

EXHIBIT I

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-2670
D.C. Docket No. 93-852-CIV-T-21A

ERIC STATTIN, BRUCE A. BEERY, CHARLES F. BISSETT, EUGENE L. WILLIAMS, JR.,

Plaintiffs-Appellants

versus

RESOLUTION TRUST, in its corporate capacity, in its capacity as Receiver for Florida Federal Savings, F.S.B., and in its capacity as Receiver for Florida Federal Savings Bank,

Defendants-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(December 28, 1995)

Before EDMONDSON, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1

EXHIBIT II-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ERIC STATTIN, Plaintiff
V. Case No. 93-852-CIV-T-21A

RESOLUTION TRUST CORPORATION, in its corporate capacity as Receiver for Florida Federal Savings, F.S.B., and in its capacity as Receiver, for Florida Federal Savings Bank
Defendant

ORDER

This cause comes before the Court on Defendants' Motion to Dismiss (Dkt#15), in which the Resolution Trust Corporation seeks to dismiss Plaintiff's claims against it in its various capacities. Plaintiff in this action was an officer of Florida Federal Savings Bank ("FFSB"). In April of 1988, Plaintiff entered into a settlement agreement upon his termination with FFSB, in which FFSB agreed to pay Plaintiff retirement benefits for a period of 15 years. In November of 1990, the Office of Thrift Supervision ("OTS") declared FFSB insolvent and appointed the RTC as receiver ("RTC Receiver"). The OTS then chartered a new institution, Florida Federal Savings Bank, F.S.B. ("Florida FSB") and appointed the RTC as conservator of the new thrift. Additionally, RTC Receiver entered into a purchase and assumption agreement with the RTC as

conservator of FFSB, under which certain assets and liabilities of FFSB were transferred to Florida FSB. Defendants assert the that liability of FFSB created by the settlement agreement with Plaintiff was not transferred to Florida FSB, but remained with RTC Receiver.

On February 19, 1991, RTC Receiver disaffirmed FFSB's settlement agreement with Plaintiff, pursuant to 12 U.S.C. §1441a(b)(4)(A). Plaintiff then filed a timely administrative claim in the amount of $495,285.48, the balance allegedly due under the settlement agreement at the time of repudiation. Since that time, in August of 1991, Florida F.S.B. has been placed in receivership of the RTC ("RTC New Receiver").

On July 3, 1992, an amendment to the statute which Plaintiff challenges in this action, Florida Statute §658.84, took effect. Section 658.84 provides:

> (2)Unsecured claims for payment against any financial institution shall have the following priority for any distribution made after July 3, 1992:
>
> (c) Approved claims for a "deposit," as that term is defined in 12 U.S.C. §1813(l);
>
> (d) Approved claims for other general creditors...

In September of 1992 RTC Receiver allowed Plaintiff's claim and issued a "Receiver Certificate of Proof of Claims No. 27, " stating that Plaintiff was an approved creditor of FFSB in the amount of $495,285.48. In November of 1993, [sic] RTC, in an unspecified capacity, notified Plaintiff that pursuant to section 658.84, "all depositors have priority over other general creditors for payment against any financial institution." Following this

notice, Plaintiff filed his four-count Complaint in May of 1993. Plaintiff asserts that the application of section 658.84, which lowers the priority of his claim, has greatly reduced the value of the claim. He contends that the RTC has wrongfully applied section 658.84 to lower the priority of his claim, because section 658.84 was intended to apply only to distributions from institutions placed into receivership after the July 3, 1992 effective date of that section. Count I of Plaintiff's Complaint seeks a declaratory judgment regarding the proper application of section 658.84. In Count II, Plaintiff seeks payment of his claim or distribution in an amount pro rata with other depositors. Count III alleges an unjust enrichment claim against RTC. Lastly, in Count IV, Plaintiff challenges the constitutionality of section 658.84, asserting that its retroactive application constitutes a taking in violation of the Fifth Amendment of the Constitution.

Defendants make several arguments in support of dismissal, each of which the Court will address herein. Defendants first seek dismissal of all counts of Plaintiff's Complaint against RTC in its corporate capacity ("RTC Corporate") and RTC New Receiver on the ground that the Court lacks jurisdiction over the RTC in these two capacities. Courts have consistently recognized the distinct capacities in which the RTC operates, and have held that he RTC is only liable for its acts in the capacity in which it undertakes those acts. See 12 U.S.C. §1821(d)(2)(A); Trigo v. FDIC, 847 F.2d 1499, 1502 (11th Cir. 1988). Defendants assert that because RTC Receiver was the sole entity charged with the determination of creditors' claims against FFSB and the distribution of its assets, Plaintiff can

only bring his action against RTC Receiver. Plaintiff, in response, asserts that he challenges not only the distribution of assets, but also RTC Corporate's decision to apply section 658.84 to receiverships in existence prior to the effective date of that section.

The RTC is required to apply the priority distribution methods in section 658.84 by the provisions of 12 C.F.R §360(a)(6). 12 C.F.R. §360.2, "Priorities," provides in pertinent part:

> (a) Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:
>
> (6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated...however, that if the association is chartered and was operated under the laws of a state that provided a priority for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph (a)(6) shall be observed by the receiver; and provided further, that if deposits of a Federal association are booked or registered at an office of such association that is located in a State that provides such priority with respect to State-chartered association, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver.

EXHIBIT II-5

The Court cannot conclude, as a matter of law, that the RTC did not act in its corporate capacity when making the determination that section 658.84 would apply to pre-July 3, 1992 receiverships. See 12 U.S.C. §1441a(b)(11)(A) (powers of RTC Corporate include the power to adopt rules and regulations). Accordingly, the Court concludes that it has jurisdiction to consider Plaintiff's claim against RTC Corporate.

Defendants also assert that RTC New Receiver is not a proper party to this action because RTC Receiver was the only entity charged with the determination of Plaintiff's claim. Plaintiff has attached a letter to his Complaint which may indicate otherwise. The letter from the RTC in an unspecified capacity states references [sic] the issuance of a receivership certificate following the appointment of RTC New Receiver at Florida F.S.B. When accepting the allegations of Plaintiff's Complaint as true and construing them in a light favorable to Plaintiff, it is possible that Plaintiff's receiver's certificate may have been issued by RTC New Receiver. See Quality Foods de Centro America, S.A. v. Latin America Agribusiness Development Corp., S.A., 711 F.2d 989, 994-995 (11th Cir. 1983). Accordingly, the Court concludes that it has jurisdiction to consider Plaintiff's claims against RTC New Receiver.

As a second ground for dismissal, Defendants argue that the Court lacks subject matter jurisdiction to grant the Plaintiff's demand for an immediate distribution of his retirement benefits. Defendants assert that this demand directly contravenes 12 U.S.C. §1821(d)(10), which gives RTC as receiver

discretion over the timing and amount of payments to claimants, and 12 U.S.C. §1821(j), which prevents courts from granting injunctive relief against the RTC. See Ward v. Resolution Trust Corporation, 996 F.2d 99 (5th Cir. 1993); In Re: Landmark Land Co., 973 F.2d 283 (4th Cir. 1992).

The Court may not "take any action...to restrain or affect the exercise of powers or functions of the Corporation as conservator or receiver." 12 U.S.C. §1821(j). The Court therefore lacks jurisdiction to order specific performance which would restrain the RTC in exercise of statutory powers and functions. See Ward, 996 F.2d at 103. The RTC acts within its statutory powers as receiver when it establishes the priority, timing, and amount of payments to claimants. 12 U.S.C. §1821(d)(10), (I)(2). Accordingly, the Court cannot compel the RTC to make immediate payment to Plaintiff. However, the Court does have jurisdiction to grant declaratory relief regarding the proper application of section 658.84, to determine if Plaintiff's claim should be paid on a pro rata basis with depositors, and to order such pro rata payment if necessary.

Defendant next seeks to dismiss Plaintiff's unjust enrichment count pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim for relief. When evaluating the sufficiency of Plaintiff's claim for purposes of a motion to dismiss, the Court "must accept the facts pleaded as true and construe them in alight favorable to [plaintiff]". Quality Foods de Centro America, 711 F.2d at 994-995. Defendant contends that Plaintiff has failed to allege the four essential elements of an

unjust enrichment cause of action, which include: 1) a benefit flowing from plaintiff to defendant; 2) appreciation of the benefit by defendant; 3) acceptance of the benefit by defendant; and, 4) circumstances making it inequitable for defendant to retain the benefit without paying for it. See Craig W. Sharp, P.A. v Adalia Bayfront Condominium, Ltd., 547 So.2d 674, 676 (Fla. 2d DCA 1989). Plaintiff, in his Complaint, alleges that the RTC has been unjustly enriched in the amount of the pro rata distribution of benefits which he would receive had the priority of his claim not been reduced by the application of section 658.84. Plaintiff does not expressly allege that he has conferred a benefit upon the RTC or that the RTC accepted such a benefit. However, the facts alleged by Plaintiff, when taken as true, may establish those elements necessary to show that the RTC in one of its various capacities was unjustly enriched by application of section 658.84 to Plaintiff's claim. Accordingly, dismissal of this count is not proper.

Lastly, Defendants seek dismissal of Count IV of Plaintiff's Complaint, in which he asserts that the section 658.84, when applied retroactively, constitutes a taking of private property for public use without just compensation, in violation of the Fifth Amendment of the United States Constitution. Defendants first argue that the Court lacks jurisdiction over this claim because Plaintiff has not sufficiently alleged that he has a specific property right subject to heightened protection under a Fifth Amendment taking analysis. Courts have refrained from utilizing a specific formula for determining when a taking has occurred, and instead have evaluated the

circumstances surrounding each case. United States v. Security Industrial Bank, 459 U.S. 70, 75 (1982). Courts, however, will examine several factors in evaluating whether an uncompensated taking has occurred, including: 1) "the economic impact of the regulation on the claimant"; 2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and 3) "the character of the governmental action." Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 221, 224-225 (1986). Not all economic interests qualify as property for the purpose of a Fifth Amendment taking. United States v. Willow Power Co., 324 U.S. 499, 502 (1945). The United States Supreme Court has consistently indicated that legislation readjusting rights and burdens does not constitute an unlawful taking solely because it upsets otherwise settled expectations of claimants. Connolly, 475 U.S. at 223; see also North Arkansas Medical Center v. Barrett 962 F.2d 780 (8th Cir. 1992)(holding that retroactive application of FIRREA's amendment to 12 U.S.C. §1823(e) to deny a secured creditor's priority did not constitute an uncompensated taking).

Plaintiff in this action obtained an interest in assets of FFSB when he entered his settlement agreement and retired in accordance therewith, prior to the failure of the institution. Marsa v. Metrobank for Savings, F.S.B., 825 F.Supp. 658, 663 (D.N.J. 1993). When the RTC disaffirmed the settlement agreement, Plaintiff's [sic] became entitled to damages in the amount due under the agreement. Id.; Howell v.Federal Deposit Insurance Corp. 986 F.2d 569, 571 (1st Cir. 1993)(holding

that RTC's repudiation of a contract gives rise to an ordinary contract claim for damages). The RTC, in recognition of Plaintiff's valid claim, issued him a receivership certificate. Plaintiff's certificate represents a right to payment from the pool of assets of the failed institution, but does no grant Plaintiff a secured interest in those assets. In re Advisory Opinion to the Governor, 593 A.2d 943, 949 (R.I. 1991); see also Goodman v. Resolution Trust Corp., 7 F3d 1123 (4th Cir. 1993); Spears v. Federal Deposit Insurance Corp., 793 F2d 270 (10th Cir. 1986). Additionally, the certificate does not guarantee full payment of Plaintiff's claim. In re Advisory Opinion to the Governor, 593 A.2d at 949 (holding that operation of depositor preference statute does not constitute a Fifth Amendment taking). The Court cannot conclude that Plaintiff's unsecured expectation of an unspecified distribution, as represented by his receiver's certificate, constitutes a property right which merits protection under the Fifth Amendment. Accordingly, the Court will dismiss Count IV of Plaintiff's Complaint, and need not reach the issue of whether the application of section 658.84 constitutes an uncompensated taking in violation of the Fifth Amendment.

Upon consideration of the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Defendants' Motion to Dismiss (Dkt #15) is GRANTED insofar as Count IV of Plaintiff's Complaint is DISMISSED for failure to state a claim. Additionally, with respect to Count II, the Court finds that it cannot compel the RTC to make immediate payment to claimant.

2. Defendants' Motion to Dismiss is otherwise DENIED.

DONE AND ORDERED, at Tampa, Florida, this

EXHIBIT II-10

25th day of March, 1994.
(signed)RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT III-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ERIC STATTIN
Plaintiff CASE NO. 93-852-CIV-T-21A
V.
RESOLUTION TRUST CORPORATION, in its corporate capacity, in its capacity as Receiver for Florida Federal Savings, F.S.B., and in its capacity as Receiver for Florida Federal Savings Bank
Defendants

BRUCE BEERY
Plaintiff CASE NO.94-1567-CIV-T-21E
V.
RESOLUTION TRUST CORPORATION, in its corporate capacity, in its capacity as Receiver for Florida Federal Savings, F.s.b., and in its capacity as Receiver for Florida Federal Savings Bank
Defendants

CHARLES BISSETT
Plaintiff CASE NO.94-1568-CIV-T-21A
V.
RESOLUTION TRUST CORPORATION, in its corporate capacity, in its capacity as Receiver for Florida Federal Savings, F.S.B., and in its capacity as Receiver for Florida Federal Savings Bank
Defendants

EUGENE L. WILLIAMS, JR.
Plaintiff CASE NO. 94-1569-CIV-T-21B
V.
RESOLUTION TRUST CORPORATION, in its corporate capacity, in its capacity as Receiver for Florida Federal Savings, F.S.B., and in its capacity as Receiver for Florida Federal Savings Bank
Defendants

EXHIBIT III-2

ORDER

This cause comes before the Court on Plaintiff Stattin's Motion for Summary Judgment (Dkt. 5) and on Defendants' Cross-Motion for Summary Judgment (Dkt. 35).[1] Pursuant to the Court's March 28, 1995 Order (Dkt. 51), Plaintiffs in consolidated Case Nos. 94-1567-CIV-T-21E, 94-1568-CIV-T-21A, and 94-1569-CIV-T-21B have informed the Court that they have no objection to the Court's rulings on the motions for summary judgment filed by Plaintiff Stattin and Defendants standing over to them and binding them in this litigation.[2]

The Plaintiffs in each of these consolidated cases were employed by Florida Federal Savings and Loan Association (FFS&L). FFS&L entered agreements ("Retirement Benefit Agreements") with each Plaintiff in which

---

[1]Defendants have filed herein a Motion for Leave to File a Reply Brief in Support of Cross-Motion for Summary Judgment (Dkt. 43). Upon due consideration, Defendants' motion is DENIED.

[2]Plaintiffs Williams, Beery and Bissett indicate that their cases differ from Plaintiff Stattin's case only in that they were issued Receiver's Certificates prior to the enactment of Florida's Depositor Preference Statute, while Plaintiff Stattin was issued his Receiver's Certificate following enactment of the statute. Plaintiffs Williams, Beery and Bissett indicate that the Court's rulings on the cross-motions for summary judgment should not bind them to the extent that the date of issuance of the receiver's certificate becomes a significant fact in the Court's decision. The Court's rulings herein are not, however, affected in any manner by the date of issuance of a Receiver's Certificate. Therefore, the Court's rulings herein will bind the Plaintiffs in the consolidated cases.

FFS&L agreed to pay monthly benefits to each Plaintiff following retirement. FFS&L began making payment of benefits to each Plaintiff under the parties' respective agreements. The successor to FFS&L, Florida Federal Savings Bank ("FFSB"), continued making those retirement benefit payments up until approximately October 31, 1990.

On November 9, 1990, the director of the Office of Thrift Supervision ("OTS") placed FFSB in federal receivership under the control of the Resolution Trust Corporation ("RTC"). The RTC, in its receivership capacity, took possession of FFSB's assets and transferred certain assets to a newly-created institution, Florida Federal Savings, F.S.b. ("Florida Federal"). RTC was subsequently appointed receiver of Florida Federal.

On February 19, 1991, the RTC, pursuant to 12 U.S.C. §§1441A(b)(4)(A) and 1821(e)(1), disaffirmed the Retirement Benefit Agreements to which Plaintiffs were parties. The RTC sent letters of disaffirmance to each Plaintiff, disaffirming the subject agreements and recommending that each Plaintiff take steps necessary to protect his interests. Pursuant to 12 U.S.C. §1821, the Plaintiffs filed proofs of claim against the insolvent institution to obtain a distribution from the assets of the institution. On April 17, 1992, the RTC allowed Plaintiff Bissett;s claim for $124,395.50 and allowed Plaintiff Williams' claim for $562,594.42, their total unpaid retirement benefits, and issued them Receiver's Certificates in the amount of their unpaid benefits. On May 6, 1992, the RTC allowed Plaintiff Beery's claim for $369,459.00, the total amount of his unpaid retirement benefits, and issued

him a Receiver's Certificate in that amount. On September 17, 1992, the RTC allowed Plaintiff Stattin's claim for $495,285.48, his total unpaid retirement benefit, and issued him a Receiver's Certificate in that amount. The RTC sent to each Plaintiff, along with their Receiver's Certificates, a letter which indicated that "You may receive payment of your claim through periodic dividend distributions on a pro rata basis along with all other approved claimants."

On July 3, 1992, The florida Legislature enacted Florida Statutes, Section 658.84 ("Florida's Depositor Preference Statute"). Section 658.84 provides in relevant part:

(2) Unsecured claims for payment against any financial institution shall have the following priority for any distribution made after July 3, 1992:

(a) Expenses of the liquidation receivership estate;
(b) State claims;
(c) Approved claims for a "deposit," as that term is defined in 12 U.S.C. §1813(l);
(d) Approved claims for other general creditors...

Plaintiffs Bissett, Beery, and Williams received their Receiver's Certificates prior to the enactment of Section 658.84, while Plaintiff Stattin received his Receiver's Certificate subsequent to the enactment of Section 658.84.

Following enactment of the statute, the RTC sent notices to Plaintiffs to inform them of the impact of Section 658.84 upon their receivership claims. The "Important Notice to General Creditor Claimants" informed the failed

institution's general creditors of the enactment of Florida's Depositor Preference Statute and indicated that "[t]his action means that all depositors (including the RTC as subrogee for uninsured depositors) have priority over other general creditor [sic] for payment against any financial institution... The claims of the former association's depositors, and all other claimants of the former institution who have higher priority MUST be paid in full (100%) before any distributions will be made to the general creditors. For this reason, it is unlikely that any funds will be available for distribution to the general creditors."

Following receipt of this Notice, Plaintiffs filed their respective actions. Plaintiffs seek a declaratory judgment that Section 658.84, Florida's Depositor Preference Statute, "be construed to apply only to distributions occurring with respect to receiverships commenced after July 3, 1992, the effective date of the Statute." Each Plaintiff also alleges a claim of unjust enrichment and seeks specific relief against the RTC in the amount of his unpaid retirement benefits.

Several statutory provisions and regulations govern the manner in which the RTC determines claims and distributes monies obtained from the liquidation of an insured depository institution. The RTC, as receiver, has authority to determine whether to allow or disallow a claim filed by a creditor of a failed institution. 12 U.S.C. §1821(d)(10). The receiver then has the discretion to pay those claims which it has allowed to the extent that funds are available to pay the claims. 12 U.S.C. §1821(d)(10).

At the time the RTC became receiver of FFSB, applicable statutory authority

required the RTC or FDIC, as receiver of an institution, to retain for itself the portion of the amounts realized from any liquidation which the receiver was entitled to receive in connection with the subrogation of the claims of depositors. The receiver was then required to pay depositors and other creditors the net amounts available for distribution to them. 12 U.S.C. §1821(d)(11). At that time, the RTC and FDIC prioritized the unsecured claims against a failed institution or a receiver of the institution, for the purpose of distributing funds, pursuant to 12 C.F.R. §360.2 ("Section 360.3").[3] That section provides:

(a)Unsecured claims against an association or the receiver that are proved to the satisfaction of the receiver shall have priority in the following order:.....

(6) Claims for withdrawable accounts, including those of the Corporation as subrogee or transferee, and all other claims which have accrued and become unconditionally fixed on or before the date of default, whether liquidated or unliquidated, except as provided in paragraphs (a)(1) through (a)(5) of this section, provided, however, that if the association is chartered and was operated under the laws of a state that provided a priority for holders of withdrawable accounts over such other claims or general creditors, such priority within this paragraph(a)(6) shall be observed by the receiver; and provided further, that

---

[3]At the time the parties submitted their memoranda, 12 C.F.R.§360.2 was the regulatory provision which set priorities for unsecured claims. However, on January 21, 1994, subsequent to the filing of the memoranda, that provision was redesignated as 12 C.F.R. §360.3.

if deposits of a Federal association are booked or registered at an office of such association that is located in a State that provides such priority with respect to State-chartered associations, such deposits in a Federal association shall have priority over such other claims or general creditors, which shall be observed by the receiver .....

Section 360.3 became effective on August 15, 1988, and originally established a priority structure for unsecured claims applicable to all FSLIC receiverships under 12 U.S.C. §596c. 53 Fed. Reg. 30665 (1988).[4] However, in 1993 congress amended 12 U.S.C. §1821 by establishing a national priority scheme for distribution of amounts realized from the liquidation of an insured depository institution. The Distribution scheme gives a priority to "[a]ny deposit liability of the institution" over general creditors of the institution. 12 U.S.C. §1821(d)(11) (entitled "Depositor preference"). Nevertheless, the 1993 amendment does not affect the priority of Plaintiffs' claims, as it applies only to depository institutions for which receivers were appointed after the date of the enactment of the amendments on August 10, 1993. Pub.L. No. 103-66 §3001(c)(1993).

In support of summary judgment, Plaintiffs argue that their priority rights to a distribution of the assets of FFSB became fixed on the date on which the OTS placed FFSB in federal receivership under the control of the

[4]The provision establishing such priorities was originally set forth at 12 C.F.R. §569c.11(a)(6),but was subsequently redesignated on several occasions.

RTC. According to Plaintiffs, the statutory and regulatory scheme governing Plaintiffs' priorities at that time provided Plaintiffs a right to share in the assets of Florida Federal equally with FFSB''s depositors and other general creditors, as Florida had not yet enacted a depositor preference statute when the RTC commenced its receivership. Plaintiffs assert that application of Section 658.84 would have a retrospective effect by lowering the priority of their claims in the scheme governing distribution of the institution's assets. Plaintiffs argue that the statute cannot be applied retroactively because the Florida Legislature did not expressly indicate in the statute an intent to apply the statute to reorder priorities established prior to its enactment. Plaintiffs further contend that the RTC's retroactive application of the statute to deny them of their benefits violates Florida and federal constitutional principles.

Defendants respond that they applied Section 658.84 to Plaintiffs' distributions in accordance with 12 C.F.R. §360.3, which required a receiver to observe a priority given to depositors under a state's depositor preference statute. Defendants argue that the plain language and legislative history of Section 658.84 clearly indicate that the statutory priorities govern distributions from any depository institution, regardless of the date it was placed in receivership. Defendants further assert that Section 658.84 has no retroactive effect because it does not impact amounts that were distributed prior to the enactment of Section 658.84. Lastly, Defendants note that even if the statute has a retroactive effect on established

distribution priorities, an application of the statute does not violate constitutional or state-law principles. Under Florida law, substantive statutes are presumed to operate prospectively, unless the Legislature clearly expresses that it intends the statute to operate retrospectively. Alamo Rent-A-Car v. Mancusi, 632 So2d 1352,1358(Fla. 1994)(citing State v. Lavazzoli, 434 So2d 321 (Fla. 1983) and Walker & LaBerge, Inc. v. Halligan, 344 So. 2D 239 (Fla. 1977). In contrast, a procedural or remedial statute applies retrospectively to cases pending at the time of the statute's enactment. Alamo Rent-A-Car, 632 So.2d at 1358. The presumption of prospective application of a substantive statute is particularly strong when retroactive application of the law would "impair or destroy existing rights."Id. at 1358. Florida's standard for determining when a statute operates retrospectively resembles the standard set forth by the United States Supreme Court in Landgraf v. U.S.I. Film Products, Inc.,--U.S.--,114 S.Ct. 1483 (1994). In Landgraf, the Supreme Court held that "when a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." Id. at 1505. In the absence of express legislative intent regarding the statute's application to pre-enactment events, a court must determine whether application of the statute would have a retroactive effect by impairing rights held by a party when he acted, imposing new duties with respect to past acts, or increasing liability for past conduct. If the statute has such a retroactive effect, a court must presume that it does not govern pre-enactment conduct, absent clear

congressional intent that it applies to the events at issue. Id. at 1505.

As a preliminary matter, the Court notes that its analysis of the retroactivity issue is not altered by the fact that the RTC applied the statute to Plaintiffs' distributions in accordance with the rules governing its conduct, set forth at 12 C.F.R. §360.3. The parties do not dispute that Section 360.3 governed the manner in which the RTC made distributions, and required the RTC to follow state depositor preference statutes when establishing distribution priorities.[5] Nonetheless, the RTC's

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[5]Plaintiffs suggest that the powers exercised by the RTC pursuant to Section 360.3 may have exceeded those powers statutorily provided to the RTC in 12 U.S.D. §(c)(13)(B) ("Section 1821(c)(13)(B) became effective on December 19,1992, Pub.L. No. 102-242 §133(e),(g)(1991), and was in effect at the time Plaintiff Stattin filed his Complaint and his summary judgment motion, but was later eliminated as part of the 1993 amendments to Section 1821. Section 1821(c)(13) (B) provided that the "corporation [shall] apply the law of the State in which the institution is chartered insofar as that law gives the claims of depositors priority over those of other creditors or claimants...." Plaintiffs note that Section 1821(c)(13)(B) only permits the RTC to apply state's depositor preference laws to prioritize claims against state-chartered institutions, not federally-chartered institutions, and, in contrast, 12 C.F.R. §360.3 permits an application of state depositor preference laws with respect to both state and federally-chartered institutions. The Court finds Plaintiffs' arguments without merit. The Federal Home Loan Bank Board was given authority to make rules and regulations for federally-chartered associations in conservatorship or receivership pursuant to Section 5(d)(11) of the Home Owners Loan Act of 1933 ("HOLA"), formerly 12 U.S.C. §1464(d)(11). The provisions of HOLA and the regulations promulgated thereunder continue to govern the activities of the FDIC

application of Section 658.84 raises an issue concerning the statute's scope of applicability, just as such issue would have been raised through application of the statute by an entity not governed by Section 360.3.[6]

The language of Section 658.84 provides a clear indication that Florida's Legislature intended the priority scheme therein to govern any distribution of a failed institution's assets made after July 3, 1992. Section 658.84 expressly states that for "any distribution made after July 3, 1992," claims for payment shall have the priorities listed in that section. Therefore, the statute not only prioritizes claims but also applies the priorities therein to a specified group of distributions on those claims. Plaintiffs ask the Court to impose the condition upon application of Section 658.84 that its priorities only to distributions from receiverships of financial institutions commenced after July 3, 1992. However, there is no indication whatsoever from the express terms of Section 658.84 that the Legislature intended to limit the application of the distribution scheme therein by the date on which the financial

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and RTC when acting as conservator or receiver of a depository institution, pursuant to Section 401(h) and 401(i) of FIRREA. See also 21 U.S.C. §1821(c)(2)(B). Therefore, the RTC did not exceed its statutory authority in continuing to apply the provisions of 12 C.F.R. 360.3 to both state and federally-chartered institutions.

6. For example, Section 658.84 regulates distributions made by a receiver or liquidator ppointed by the State Department of Banking and finance.

institution entered receivership. Instead, the statutory language of Section 658.84 indicates that the priority scheme governs distributions from "any" financial institution. The broad language of section 658.84 expresses the Legislature's intent that the Section apply to distributions on claims against any financial institution, regardless of the date it was placed in receivership.

Generally, a statute should not be interpreted in a manner that makes its words or phrases redundant or meaningless. Regency Towers Owners Assn. Inc. v. Pettigrew, 436 So.2d 266, 267(Fla. Lst DCA 1983), rev. Denied 444 So.2d 417 (Fla. 1984); see also U.S. V. Canals-Jiminez, 943 F.2d 1284, 1287 (11th Cir. 1991). Plaintiffs' reading of Section 658.84 would render meaningless a portion of the statutory language therein. Under Plaintiffs' interpretation, the statute would set forth a priority scheme for distributions only from those receiverships commenced after the statute's enactment on July 3, 1992. If, however, the distribution scheme applied only to post-enactment receiverships, it would not have been necessary for the Legislature to specify those distributions to which the scheme applied, as a receiver can make no distributions on claims against an institution until the commencement of its receivership. Plaintiffs' interpretation of the statute thus renders meaningless or unnecessary the clause therein which provides that the priorities apply "for any distribution made after July 3, 1992." In contrast, all phrases within the statute acquire meaning under an

interpretation in which the priority scheme applies to all distributions made after July 3, 1992 from both pre-enactment and post-enactment receiverships.

Lastly, the legislative history of Section 658.84, although sparse, supports a finding that the section establishes priorities for distributions from receiverships established both before and after its enactment. The Legislature's draft version of Section 658.84 established the applicable priorities for unsecured claims, but did not include the phrase "for any distribution made after July 3, 1992." Had Florida enacted the draft version into law, it would have been unclear whether the Legislature intended the distribution scheme to have the retrospective effect of reordering previously established priorities and imposing new priorities for distributions made subsequent to the statute's enactment. However, Florida's Legislature added the above-quoted phrase prior to the enactment of the provision, evidencing its intent to cause such a reordering for any distribution made after July 3, 1992.

Because the Court has determined that the Florida Legislature intended Section 658.84's priority scheme to apply to distributions from receiverships established both before and after that section's enactment, the priorities set forth therein govern all distributions of Plaintiffs' claims.[7] Accordingly, the RTC properly applied that section when

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[7]It does not appear, from a review of the parties' submissions herein, that any Plaintiff received a distribution on his claim prior to July 3, 1992.

declaring its intent to make distributions to depositors, and the RTC as subrogee for uninsured depositors, prior to making any distributions to Plaintiffs.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that:

1. Plaintiff Stattin's Motion for Summary Judgment (Dkt. 5) is DENIED.
2. Defendants' Cross-Motion for Summary Judgment (Dkt.35) is GRANTED.
3. The Court's rulings on Plaintiff Stattin's Motion for Summary Judgment and on Defendants' Cross-Motion for Summary Judgment stand over and bind Plaintiffs in consolidated Case Nos. 94-1567-CIV-T-21E, 94-1568-CIV-T-21A, and 94-1569-CIV-T-21B.
4. All pending motions in the lead case and consolidated cases which the Court haS not addressed herein, are DENIED as MOOT.
5. The Clerk is DIRECTED to enter judgment against Plaintiffs in the lead case and all consolidated cases.

DONE AND ORDERED, at Tampa, Florida, this 28th day of April, 1995.

SIGNED BY Judge Nimmons

EXHIBIT IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 95-2670

ERIC STATTIN, BRUCE A. BERRY, CHARLES F. BISSETT, EUGENE L. WILLIAMS, JR., Plaintiff-Appellants,

V.

RESOLUTION TRUST, in it corporate capacity in its capacity as Receiver for Florida Federal Savings, F.S.B., and in its capacity as Receiver for Florida Federal Savings Bank,

Defendant-Appellee

On Appeal from the United States District Court for the
Middle District of Florida
Filed February 29, 1996

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion_____, 11th Cir., 19__)

Before: EDMONDSON, DUBINA and BARKETT, Circuit Judges

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
Signed Joe F. Dubina UNITED STATES CIRCUIT JUDGE

EXHIBIT V-1

Resolution Trust Corporation
Southeast Consolidated Office
P.O. Box 20687
Tampa,Florida 33622-0687

Mr. Eric Stattin
Post Office Box 1842
Park City, Utah 84060 September 17, 1992

SUBJECT: 8211-Florida Federal Savings, F.S.B.
St. Petersburg, Florida - In Receivership

RECEIVER'S CERTIFICATE NO: 00027

Dear Claimant:

On November 9, 1990, Florida Federal Savings, F.S.B. was closed by the office of Thrift Supervision and the Resolution Trust Corporation was appointed as Receiver.

Enclosed you will find your Receiver's Certificate. This certificate represents your recorded claim against the failed institution and should only be surrendered to the RTC upon final distribution of funds at the termination of this Receivership. In the meantime, your Receiver's Certificate should be maintained in a secure location as it is a legal document.

You may receive payment of your claim through periodic dividend distributions on a pro rata basis along with all other approved claimants. These dividends are generated from the ongoing collections of the former banks assets.

Please notify the Receiver of any address change. Should you have any questions, please contact the Claims Department at (Tampa WATS) 1-800-283-1241 or 813-870-7000.

Sincerely, Debbie Brown Claim Specialist
Encl. cc: Simon J. Jaspers

EXHIBIT V-2

0211-Florida Federal Savings, F.S.B.-St. Petersburg, Florida

(Name & location of financial institution)

Receiver's Certificate of Proof of Claim-No. 27

Sept. 3,1992

This is to Certify That Eric Stattin, Self 347-26-7779
(name) (Tax No./SSN)
of P.O. Box 1842 Park City, Utah 84060

has made satisfactory proof that Eric L. Stattin is a creditor of the Florida Federal Savings,F.S.B. St. Petersburg FL.
(Financial Institution, City and State)

In the amount of FOUR HUNDRED NINETY FIVE THOUSAND TWO HUNDRED EIGHTY FIVE AND 48/100 Dollars

upon the following claim(s) to wit:
Executive Retirement Compensation Agreement

Balance due in excess of any amount paid by and assigned to the Resolution Trust Corporation

Claim Number	**Amount**
940./000032	**495,285.48**
Total	**495,285.48**

and said creditor or the lawful assignee of this claim will alone be entitled to any distributions made hereon.

No assignment of this claim, or any portion thereof, will be recognized as to any distribution unless written notice of assignment has been given to the Receiver and accepted by it and entered hereon before such distribution has been paid.

This certificate must be surrendered to the Receiver upon payment of the final distribution. Claimant should notify the Receiver promptly of any change in claimant's address.

Resolution Trust Corporation

Receiver

signed atty 8/19/92 By: *illegible signature*

EXHIBIT V-3

Assignment: _____. 19

For value received claimant herein named hereby transfers and assigns the within claim to

_____
(name and address)

_____ _____
witness-address (signed)

_____

Entered and accepted_____. 19

by_____

Resolution Trust Corp
Bank 7386 Florida Federal Savings Bank

Federal Deposit Insurance Corporation
Balance Sheet For Liquidation Accounting
As of 6/30/92

EXHIBIT VI

	End Current Period		Beginning Current Year		Inception Date
	Book Value	Liq Est Value	Book Value	Liq Est Value	Book Value
Assets					
Cash/Investments	250,301,183	250,301,183	78,432,958	78,432,958	
Due from FDIC-escrowed funds	5	5	704,072	704,072	
Receivables/Advances	38,815,145	38,815,145	2,726,789	2,726,789	
Assets in Liquidation					
Loans	19,397,601	19,397,601	65,002,499	65,002,499	540,007,393
Securities	9,143,200	9,143,200	9,143,200	9,143,200	12,782,168
Real Estate Mortgages	329,146,215	329,146,215	476,178,898	476,178,898	1,270,840,291
Owned Assets	36,394,331	36,394,331	46,785,659	46,785,659	51,536,846
Other Assets/Judgements	66,646,941	66,646,941	(26,887,139)	(26,887,139)	294,076,359
Equity in Subsidiaries					
Serviced Assets/Bowest					
Total Assets	749,844,621	749,844,621	652,086,934	652,086,934	2,169,243,057
Liabilities					
Accounts/Notes Payable	(546,080)	(546,080)	(66,673)	(66,673)	
Settlement	(1,108,910)	(1,108,910)	(1,177,048)	(1,177,048)	
Trustee for Owner	(215,222)	(215,222)	(34,854)	(34,854)	
Payments in Process	(133,770,430)	(133,770,430)	(11,906,391)	(11,906,391)	
Depositor/Creditor Claims					
Unproven Claims-Non-FDIC	(2,329,936)	(2,329,936)	(2,329,936)	(2,329,936)	(2,354,018,490)
Proven Claims-Non-FDIC	(2,313)	(2,313)			
Claims Assigned to FDIC	(894,247,902)	(894,247,902)	(952,866,678)	(952,866,678)	
Due to FDIC	(3,020,697)	(3,020,697)	(748,746)	(748,746)	
Contingent Liabilities	(34,886,594)	(34,886,594)	(25,000,000)	(25,000,000)	
Total Liabilities	(1,070,128,084)	(1,070,128,084)	(994,130,326)	(994,130,326)	(2,354,018,490)
Equities					
Original Equity Net of Adjstmets	104,814,023	104,814,023	146,047,080	146,047,080	184,775,433
Premiums Paid or Received	(10,700,000)	(10,700,000)	(10,700,000)	(10,700,000)	
Income/Loss of the Liquidation					
Beginning Balance	183,796,347	183,796,347	181,696,313	181,696,313	
Incr/Decr Current Period	7,486,497	7,486,497			
Ending Balance	191,282,844	191,282,844	181,696,313	181,696,313	
Adj for Liq Est Value					
Beginning Balance	34,886,594	34,886,594	25,000,000	25,000,000	
Incr/Decr-Liq Est Value					
Incr/Decr-Litigation					
Ending Balance	34,886,594	34,886,594	25,000,000	25,000,000	
Total Equity	320,283,461	320,283,461	342,043,393	342,043,393	184,775,433
Total Liability & Equity	(749,844,623)	(749,844,623)	(652,086,933)	(652,086,933)	(2,169,243,057)

Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

No. 95-1573

In the Supreme Court of the United States

OCTOBER TERM, 1995

ERIC STATTIN, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a receiver's certificate tendered in response to petitioner's retirement benefits claim constitutes a property interest protected by the Fifth Amendment to the United States Constitution.

2. Whether the Florida Depositor Preference Statute, which applies to distributions from receiverships established both before and after its enactment, retroactively changed the priorities followed by the receiver in violation of petitioner's Fifth Amendment property rights.

3. Whether the Resolution Trust Corporation incorrectly applied its regulation regarding unsecured claims, 12 C.F.R. 360.3, in violation of petitioner's Fifth and Fourteenth Amendment rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1573

ERIC STATTIN, PETITIONER

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FEDERAL DEPOSIT INSURANCE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. I) is unpublished, but the decision is noted at 74 F.3d 1252 (Table). The opinion of the district court (Pet. App. III-1 to III-14) is reported at 883 F. Supp. 678.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1995. A petition for rehearing was denied on February 29, 1996. Pet. App. IV. The petition for a writ of certiorari was filed on March 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. While petitioner was employed by Florida Federal Savings and Loan Association (FFS&L), he entered into an agreement whereby FFS&L agreed to pay him monthly benefits over a span of years following his retirement from employment. Pet. App. III-2 to III-3. After petitioner retired from FFS&L, the institution began making payments to him commencing in September, 1988; these payments were to continue for 15 years. Pet. 3. Florida Federal Savings Bank (FFSB), the successor to FFS&L, continued making retirement payments to petitioner until approximately October 31, 1990. Pet. App. III-3.

On November 9, 1990, the Director of the United States Office of Thrift Supervision (OTS) placed FFSB into receivership and appointed the Resolution Trust Corporation (RTC) as Receiver. The RTC, in its receivership capacity, then took possession of FFSB's assets and liabilities and transferred certain assets and liabilities to a newly created institution, Florida Federal Savings, F.S.B. (Florida Federal). Florida Federal was then placed into conservatorship and the RTC was appointed Conservator. Pet. App. III-3. In August, 1991, the RTC was appointed Receiver of Florida Federal. *Id.* at II-2.

2. On February 19, 1991, the RTC disaffirmed petitioner's retirement benefit agreement pursuant to 12 U.S.C. 1441a(b)(4)(A) and 1821(e)(1). Pet. App. III-3. The RTC notified petitioner of the disaffirmance and of the steps necessary to protect his interests. *Ibid.* Pursuant to the administrative claims procedures set forth in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 212(a), 103 Stat.

222 (12 U.S.C. 1821(d)(3)(B) and (5)(B)), petitioner filed a Proof of Claim in the receivership. Pet. App. III-3. On September 17, 1992, the RTC issued a Receiver's Certificate to petitioner, certifying that petitioner had made satisfactory proof of his claim in the amount of $495,285.48, the entire amount sought. *Id.* at III-4.

3. On July 3, 1992, the Florida Legislature enacted Section 658.84 of the Florida Statutes (Florida Depositor Preference Statute), which provides that any distribution on unsecured claims from a financial institution made after July 3, 1992, shall be made so that approved claims for "deposits," as defined in 12 U.S.C. 1813(*l*), have priority over approved claims for other general creditors. Fla. Stat. Ann. § 658.84(2) (West Supp. 1996); Pet. App. III-4. At that time, the applicable federal regulation, currently codified at 12 C.F.R. 360.3,[1] provided that, in distributing funds from a receivership, the RTC was required to observe a priority given to depositors under any applicable state depositor preference statute. Pet. App. III-8.

Following enactment of the Florida statute, the RTC notified petitioner that distributions on his receivership certificate would be subordinated because "all depositors (including the RTC as subrogee for uninsured depositors) have priority over other general creditor [sic] for payment." Pet. App. III-5. The notice also stated that "[t]he claims of the former association's depositors, and all other claimants of the former institution who have higher priority MUST

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[1] The regulatory provision which set priorities for unsecured claims was at that time 12 C.F.R. 360.2. On January 21, 1994, subsequent to the filing of the parties' district court memoranda, the provision was redesignated as 12 C.F.R. 360.3.

be paid in full (100%) before any distributions will be made to the general creditors." *Ibid.*

4. In May, 1993, petitioner filed a complaint against the RTC in the United States District Court for the Middle District of Florida seeking a declaratory judgment that Florida's Depositor Preference Statute "be construed to apply only to distributions occurring with respect to receiverships commenced after July 3, 1992, the effective date of the Statute." Pet. App. III-5. Petitioner also alleged that the statute, when applied to distributions under his receivership certificate, constituted a taking of property without just compensation in violation of the Fifth Amendment. *Id.* at II-7. In addition, he claimed that the RTC was unjustly enriched and sought relief against the RTC for his unpaid retirement benefits. *Id.* at III-5.

The district court dismissed petitioner's Fifth Amendment taking claim in an order and opinion issued on March 25, 1994. Pet. App. II-9 to II-10. It later granted summary judgment in favor of the RTC on the remaining claims. *Id.* at III-1 to III-14. The court found that, under the express terms of the Florida Depositor Preference Statute, the priority scheme for distributions was not limited by the date on which the financial institution was placed into receivership. *Id.* at III-13. Further, the court observed that the legislative history of the statute indicated that the legislature intended that the Florida Depositor Preference Statute apply to distributions from receiverships established both before and after the statute's enactment. *Ibid.*

The Eleventh Circuit affirmed in an unpublished, per curiam opinion. Pet. App. I.[2]

ARGUMENT

1. Petitioner claims (Pet. 5-15) that the receiver's certificate issued by the RTC regarding his unsecured retirement benefit claim is protected property under the Fifth and Fourteenth Amendments, and that the RTC's change of petitioner's priority standing among creditors, reflecting the mandate of the Florida Depositor Preference Statute, constituted a taking of property without due process of law. This Court has consistently held that legislation "readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." See *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), this Court identified three factors that have "particular significance" in distinguishing Fifth Amendment takings from permissible governmental regulation: (1) "[the] economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

In this case, the application of the priority scheme mandated by the Florida Depositor Preference Statute had an economic impact on petitioner since his claim will now be subordinated to the claims of

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[2] In December, 1995, a motion was filed to substitute the Federal Deposit Insurance Corporation (FDIC) as statutory successor to the RTC as Receiver for Florida Federal Savings, F.S.B., and Florida Federal Savings Bank.

depositors of the failed thrift. Prior to this change, petitioner would have received distributions on a pro rata basis along with all other approved claimants. Pet. App. III-4. The Florida Depositor Preference Statute, however, did not interfere with any distinct investment-backed expectation or similarly secured position enjoyed by petitioner because there can be no such expectation in an unsecured claim. See *North Arkansas Medical Center* v. *Barrett*, 962 F.2d 780, 790 (8th Cir. 1992) ("[T]he party claiming a Fifth Amendment violation in this [retroactive application of FIRREA to deny depositor's priority] had 'more than sufficient notice' that the business of enforcing claims against a failed thrift would be subject to federal regulation." (citations omitted)). Nor is the character of the governmental action, in "adjust[ing] the benefits and burdens of economic life to promote the common good," *Connolly*, 475 U.S. at 225, in the nature of a taking. See *id.* at 227 ("We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.").

Because unsecured creditors of an insolvent entity hold only contingent rights, bankruptcy decisions have long held that Congress may legislatively change distribution priorities related to unsecured creditors, even if the change will affect estates being administered at the time of the change. See, *e.g.*, *In re Garland Corp.*, 6 B.R. 456, 462-463 (Bankr. 1st Cir. 1980) ("[T]here are no constitutional constraints inhibiting Congress in the exercise of its bankruptcy power from extinguishing the recovery rights of holders of unsecured claims, because an unsecured

claim confers no right in specific property of the obligor.") (citing *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 588 (1935)); *Coin Machine Acceptance Corp.* v. *O'Donnell*, 192 F.2d 773, 777 (4th Cir. 1951) ("We think there can be no question as to the power of Congress in the passage or amendment of a bankruptcy act to fix or rearrange priorities to be observed in the distribution of a bankrupt's estate."). As an unsecured general creditor, petitioner is subject to similar changes in the priority scheme applicable to his receivership certificate. See *In re Advisory Opinion to the Governor*, 593 A.2d 943, 949 (R.I. 1991) (concluding that a similar state Depositors Economic Protection Act did not cause unconstitutional takings because "general unsecured creditors by definition have no investment-backed expectations" but "are subject to such variables as changes in the law of receivership").

Thus, the district court correctly dismissed petitioner's Fifth Amendment takings claim, stating that "[t]he Court cannot conclude that Plaintiff's unsecured expectation of an unspecified distribution, as represented by his receiver's certificate, constitutes a property right which merits protection under the Fifth Amendment." Pet. App. II-9. The court of appeals affirmed this ruling, and no court of appeals has disagreed with its analysis.

2. Petitioner also argues (Pet. 15-29) that the Florida Depositor Preference Statute cannot be applied retroactively to reduce his priority status since the Florida legislature did not specifically provide that the statute reorder priorities established prior to its enactment. He further claims that the RTC applied the Florida Depositor Preference Statute retroactively to deny him his retirement bene-

fits in violation of Fifth and Fourteenth Amendment principles. *Ibid.*

The district court correctly concluded that "the language of Section 658.84 provides a clear indication that Florida's legislature intended the priority scheme therein to govern any distribution of a failed institution's assets made after July 3, 1992." Pet. App. III-11. The district court's interpretation is also supported by the fact that no pre-existing contract or vested rights are affected. Florida has adopted a strict definition of pre-existing or vested rights:

> To be vested, a right must be more than a mere expectation based on anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.

In re Will of Martell, 457 So. 2d 1064, 1067 (Fla. Dist. Ct. App. 1984). In *Martell*, the court upheld a new statute that terminated a trust beneficiary's right to future distributions from a trust, even though the statute was enacted after the trust establishing the right to payment was created, but before distributions were made. *Ibid.* In dismissing petitioner's claims, the district court similarly found that petitioner had only an "unsecured expectation of an unspecified distribution." Pet. App. II-9.

A statute is not impermissibly retroactive "merely because some of the facts or conditions upon which its application depends came into being prior to the enactment." *United States* v. *Irvine*, 114 S. Ct. 1473, 1482-1483 (1994), quoting *United States* v. *Jacobs*, 306 U.S. 363, 367 (1939). As this Court emphasized in *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1501 (1994), "[w]hen the intervening statute authorizes or

affects the propriety of prospective relief, application of the new provision is not retroactive." The only interests affected by the Florida Depositor Preference Statute after its effective date were possible future distributions from receivership estates. Therefore, the Florida Depositor Preference Statute did not have an unconstitutionally retroactive effect.

3. Petitioner also argues that the RTC failed to follow its own regulation governing priorities, thus violating his Fifth and Fourteenth Amendment rights. Pet. 15-19. He suggests that, since he was on equal footing with the RTC on the day the receivership began, the RTC should not have made a change in priorities, notwithstanding the Florida Depositor Preference Statute. Pet. 18-19. Petitioner notes that, after the enactment of the Florida Depositor Preference Statute, Congress amended the Federal Deposit Insurance Act, 12 U.S.C. 1821(d)(11), which now gives priority to depositors over general creditors in all saving and loan receiverships. Pet. 19. He suggests that since that federal statute only applies to receiverships which went into effect after its enactment, the RTC should have interpreted its regulation regarding the treatment of unsecured creditors and the application of state depositor preference laws, 12 C.F.R. 360.2(a)(6) (1993), to be similarly applicable only to receiverships which went into effect after the enactment of the Florida Depositor Preference Statute. Pet. 18-19.

As noted above, however, petitioner's claims are governed by the Florida Depositor Preference Statute, not 12 U.S.C. 1821(d)(11). See pp. 7-8, *supra*. The Florida statute does not contain any language that limits its application to new receiverships after its

effective date. It clearly applies to "any distribution" from receiverships disbursed after its enactment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The Florida Depositor Preference Statute, Fla. Stat. Ann. § 658.84 (West Supp. 1996) provides:

658.84. Transfers by banks and other acts in contemplation of insolvency

(1) Any and all transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any bank or trust company or of deposits to its credit; all assignments of mortgages, securities, or real estate or of any judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use or for the use of any of its stockholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof made with a view to the preference of one creditor to another shall be void.

(2) Unsecured claims for payment against any financial institution shall have the following priority for any distribution made after July 3, 1992:

(a) Expenses of the liquidation or the receivership estate;

(b) State claims;

(c) Approved claims for a "deposit," as that term is defined in 12 U.S.C. § 1813(*l*);

(d) Approved claims for other general creditors;

(e) Approved claims for obligations subordinate to deposits and other general liabilities; and

(f) Shareholders' claims in proportion to the stock held by them respectively or their interest thereon as appearing.

(3) Except in any action brought by the department, no attachment, injunction, or execution shall be enforced against such financial institution or any of its property before final judgment in any suit, action, or proceeding in any state or federal court.